Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

BETH LEWIS,

PETITIONER,

-v-

STATE OF OHIO,

RESPONDENT.

On Petition for Writ of Certiorari to the Supreme Court of Ohio

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I

DOES THE SIXTH AMENDMENT RIGHT TO COUNSEL INCLUDE THE RIGHT TO PRIVILEGED, CONFIDENTIAL, ATTORNEY-CLIENT CONSULTATION THAT WILL REMAIN PRIVILEGED AND CONFIDENTIAL AFTER THE CLIENT'S DEATH?

II

DOES THE FIFTH AMENDMENT RIGHT TO REMAIN SILENT PROTECT A CLIENT FROM REVELATION OF CONFIDENTIAL STATEMENTS MADE TO HIS LAWYER?

III.

IS THE RIGHT TO DUE PROCESS AND ACCESS TO THE COURTS INFRINGED WHEN ATTORNEY-CLIENT COMMUNICATIONS ARE NOT PROTECTED BY THE ATTORNEY-CLIENT PRIVILEGE?

LIST OF PARTIES

Petitioner is attorney Beth Lewis.

Respondent is the State of Ohio.

In the proceedings below, John Doe, an unidentified person indicted by the Montgomery County Grand Jury, was also listed as a party.

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The Montgomery County Court of Common Pleas decision appears as ***State v. Doe,*** Case No. 2002 CR 01975 (Montgomery County Court of Common Pleas)(under seal)(June 26, 2002)(unreported). The Montgomery County Court of Appeals, Second Appellate District decision appears at ***State v. Doe***, Case No. 19408 (September 19, 2002), 2002 Ohio 4966, 2002 WL 31105389 (Ohio App. 2 Dist.). The Ohio Supreme Court decision on appeal appears as ***State v. Doe***, 101 Ohio St.3d 170, 2004 Ohio 705, 803 N.E.2d 777 (2004). The Ohio Supreme Court decision denying reconsideration appears as ***State v. Doe***, 102 Ohio St. 3d. 1450, 2004 Ohio 2383, 808 N.E.2d 400 (2004).

JURISDICTIONAL STATEMENT

Reconsideration was denied on May 13, 2004. This Court has jurisdiction to entertain this petition for writ of certiorari pursuant to 28 U.S.C. § 1257(3) (1988).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend V: "No person shall . . . be compelled in any criminal case to be a witness against himself, nor be deprived of life liberty or property, without due process of law. . ."

U.S. Const. amend VI: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."

U.S. Const. amend XIV: "No state shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of laws."

Ohio Revised Code §2317.02 (Anderson) (2002):

> The following persons shall not testify in certain respects:
>
> (A) An attorney, concerning a communication made to the attorney by a client in that relation or the attorney's advice to a client, except that the attorney may testify by express consent of the client or, if the client is deceased, by the express consent of the surviving spouse or the executor or the administrator of the estate of the deceased client except that, if the client voluntarily testifies the attorney may be compelled to testify on the same subject.

STATEMENT OF THE CASE

This matter comes before the Court from the Ohio Supreme Court's denial of reconsideration on May 13, 2004. The Ohio Supreme Court declined to reconsider its interpretation of Ohio's attorney-client privilege statute, Ohio Revised Code §2317.029(A). That statute, as interpreted, allows an attorney to be compelled to testify about the contents of confidential client communications based upon a waiver by a surviving spouse, executor, or administrator of the estate, for purposes outside the scope of the often recognized "testamentary exception," once the client is deceased.

On June 26, 2002, Assistant Federal Public Defender Beth Lewis was held in contempt for her refusal to testify before the Montgomery County Grand Jury regarding confidential communications with her client Jan Marie Franks. Attorney Lewis represented Franks in several federal criminal matters. While that representation continued, a child disappeared. For reasons unknown, Ms. Franks and or persons known to Ms. Franks became

persons of interest in the investigation following the child's disappearance. Ms. Franks died on December 30, 2001. On June 19, 2002, Ms. Lewis was subpoenaed to testify.

The State produced an affidavit from Ms. Franks' surviving spouse, purportedly waiving Ms. Franks' attorney-client privilege. In doing so the State relied on Ohio Revised Code §2317.02, which provides that an attorney may testify "if the client is deceased, by the express consent of the surviving spouse or the executor or the administrator of the estate of the deceased client."

Although Ohio Revised Code §2317.02 had never before been applied except as a "testamentary exception" in a will contest, the trial judge found it applicable in the grand jury proceeding and ordered Attorney Lewis to testify. Attorney Lewis refused and was held in contempt.

The Montgomery County Court of Appeals adopted the trial judge's interpretation of the statute. The Ohio Supreme Court construed the statute to allow posthumous waiver for all purposes.

Attorney Lewis sought reconsideration under Ohio Supreme Court Rule of Practice XI, Sec. 2, asking the court to reconsider its decision in light of its infringement of the Fifth Amendment right not to self-incriminate, the Sixth Amendment right to the effective assistance of counsel and Fourteenth Amendment Due Process grounds. Ohio Supreme Court Rule of Practice XI, Sec. 2 is the mechanism by which the court will "correct decisions, which upon reflection, are deemed to have been made in error." ***State ex rel Shemo, v. Mayfiled Heights***, 96 Ohio St.3d 379, 380, 775 N.E. 2d. 493, 495 (2002). The court issued a one-line ruling on the merits denying reconsideration on May 13, 2004. It is from that ruling, as applied to the underlying decision, that attorney Lewis now timely seeks review.

REASONS FOR GRANTING THE WRIT

I.

THE SIXTH AMENDMENT RIGHT TO COUNSEL INCLUDES THE RIGHT TO PRIVILEGED CONFIDENTIAL ATTORNEY-CLIENT CONSULTATION THE CONTENT OF WHICH WILL REMAIN PRIVILEGED AND CONFIDENTIAL AFTER THE CLIENT'S DEATH.

At the time she conferred with her indigent client Jan Franks, Beth Lewis was a federal public defender. Any conversation that may have occurred regarding the subject matter being investigated by the Montgomery County Grand Jury took place in the context of that relationship. A fundamental aspect of the attorney-client relationship is the ability to engage in confidential consultation. Furthermore, although the facts of this case involve legal representation of, and consultation with, an indigent criminal defendant, the Ohio Supreme Court's interpretation of Ohio Rev. Code §2317.02 allows the State and any other litigant access to all attorney-client conversations without regard to the character of the consultation. The chilling effect of this ruling undermines the criminal defendant's right to the effective assistance of counsel and infringes every person's right of access to the courts.

The attorney-client privilege is the oldest of the privileges. ***Swidler v. United States***, 524 U.S. 399, 403 (1998); ***Upjohn Co. v. United States***, 449 U.S. 383, 389 (1981) citing 8 J. Wigmore, Evidence § 2290 (McNaughten

rev. 1961). It was firmly established in the common law long before the Sixth Amendment was ratified in 1791. See, ***Annesley v. Earl of Anglesea***, 17 How. St. Tr. 1139, 1239-1244 (1743). Thus, the right to confidential attorney-client consultation, protected by the attorney-client privilege, is an aspect of the assistance of counsel guaranteed by the Sixth Amendment. See the analysis of the Confrontation Clause and its meaning in ***Crawford v. Washington***, 124 S. Ct. 1354 (2004).

This Court has said that the government may not invade the confidential attorney-client relationship and that to do so violates the Sixth Amendment. ***Weatherford v. Bursey***, 429 U.S. 545, 558 (1977). The United States government has conceded that, "the Sixth Amendment's assistance of counsel guarantee can be meaningfully implemented only if a criminal defendant knows that his communications with his attorney are private and that his lawful preparations for trial are secure against intrusion by the government." Brief for the United States in ***Hoffa v. United States***, 385 U.S. 293 (1966) at p. 71 and Brief for the United States as *Amicus Curiae* in ***Weatherford v. Bursey***, 429 U.S. 545 (1977) at p. 24 cited in ***Weatherford,*** 429 U.S. at p. 554, fn4.

In ***Weatherford,*** the Court found no Sixth Amendment violation in the narrow fact pattern where an undercover informant was invited by the accused to attend a meeting between himself and his lawyer and there was "no tainted evidence in this case, no communication of defense strategy to the prosecution, and no purposeful intrusion." 429 U.S. at p. 558. The circumstances in ***Weatherford*** have no application in this matter. Without regard to the quality or purpose of the evidence sought, the ability to compel counsel to reveal client confidences is clearly a "purposeful intrusion."

In ***Hoffa v. United States***, 385 U.S. 293 (1966), although "none of the Petitioner's incriminating statements . . . were made in the presence of counsel," the Court assumed that had they been, "there might have been a Sixth Amendment violation." 385 U.S. at 308. Again the reasoning that avoided implication of the Sixth Amendment right to counsel in ***Hoffa*** is not present here. The statements at issue in this case were made within the attorney-client relationship, as would be any statement affected by Ohio Revised Code §2317.02(A).

Weatherford and ***Hoffa*** address situations in which the government eavesdropped on attorney-client consultations through use of informants or undercover agents. Under the Ohio Supreme Court's ruling, the accused's attorney becomes the government eavesdropper. Acting as counsel, in this case appointed counsel, the attorney solicits information from his client in order to prepare for trial, negotiate a plea, address sentencing issues, or to otherwise perform his function as counsel. It is in fact counsel's obligation to do so.

The client reveals information to his lawyer that he may never reveal in any other situation. By talking with counsel in confidence, the client may decide to reveal very private information to benefit his cause or may decide that the information is to forever remain his secret. Under the Ohio Supreme Court's ruling, that option no longer exists. Once information is revealed to an attorney in Ohio, the client loses control of that information for the lawyer may be compelled to reveal it after the client's death.

The problem cannot be avoided. The statute applies to persons who marry or who may, even posthumously, be determined to have been in a common law marriage. It extends the right to waive the attorney-client privilege to executors and administrators of estates. Thus, in Ohio,

there is no guarantee that any attorney-client consultation will remain confidential.

The fact that an attorney may be forced to reveal his client's secrets undermines the profession generally, but has particularly negative consequences for representation of the indigent. All who accept appointments, all who serve as public defenders, have been greeted by clients with theories of conspiracy and collusion with the State based simply on the fact that the lawyer is provided by the State. What was once a misunderstanding of the system now is truth in Ohio. Counsel will be the tool the state uses to reveal the client's secrets. This damages not only the client but also the legal profession. John Wigmore, in defending the attorney client privilege noted:

> If the counsellor were compellable to disclose, 'no man . . . of noble or elevated mind would stoop to such employment.' Certainly the position of legal adviser would be a difficult and disagreeable one; for it must be repugnant to any honorable man to feel that the confidences which his relation naturally invites are liable at the opponent's behest to be laid open through his own testimony. He cannot but feel the disagreeable inconsistency of being at the same time solicitor and revealer of the secrets of the cause. This double-minded attitude would create an unhealthy moral state in the practitioner. Its concrete impropriety could not be overbalanced by the recollection of its abstract desirability.

8 J. Wigmore, **EVIDENCE**, §2291 at p. 557 (Third Edition 1940).

In ***Weatherford***, this Court recognized that "one threat to the effective assistance of counsel posed by government interception of attorney-client communications lies in the inhibition of free exchanges between defendant and counsel because of the fear of being overheard." 429 U.S. at 554 fn4. Every attorney-client conversation will now be overshadowed by the fear that it will be "overheard" by the government at some future time when the defendant's lawyer repeats it. Ohio Revised Code §2317.02 is unconstitutional as interpreted by the Ohio Supreme Court.

The Ohio Supreme Court interpreted the word "may" in Ohio Revised Code §2317.02 to mean that the determination of whether the privilege will be respected is left to "the sound discretion" of each trial court as it is confronted with the question on a case-by-case basis. ***State v. Doe***, 101 Ohio St.3d at 173. This Court has said that "if the purpose of the privilege is to be served, the participants in a confidential conversation 'must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all.'" ***Jaffee v. Redmond***, 518 U.S. 1, 18 (1996) quoting ***Upjohn Co. v. United States***, 449 U.S. 383, 393 (1981).

II.

THE FIFTH AMENDMENT RIGHT TO REMAIN SILENT PROTECTS A CLIENT FROM REVELATION OF STATEMENTS MADE TO HIS LAWYER

While it is clear that not every attorney-client communication will implicate Fifth Amendment rights, it is also clear that some will inevitably do so. When a client reveals information to his lawyer that is incriminating, compelling the lawyer to reveal the client's confidence is no different from compelling the client to testify against himself.

In ***Annesley v. Earl of Anglesea***, counsel noted,

> The reason why attornies are not to be examined to any thing relating to their clients or their affairs, is, because they would destroy the confidence that is necessary to be preserved between them. . . The end is, that persons with safety may substitute others in their room; and therefore if you cannot ask me, you cannot ask that man; for every thing said to him, is as if I had said to myself, and he is not to answer it.

17 How. St. Tr. 1139, 1225 (1743) This policy underlying the attorney-client privilege has been "plainly grounded since the latter part of the 1700s." 8 J. Wigmore, Evidence, §2291 (Third Edition, 1940) Affording defendants the right to counsel, was never intended to be a means to circumvent the Fifth Amendment right to remain silent.

Some may argue that the lawyer should be required to assert the Fifth Amendment on the client's behalf rather than rely on the attorney-client privilege, but that still

violates the client's confidence and will chill the willingness of clients to reveal matter they fear may be incriminating. This will have effects far beyond the traditional criminal arena of assaults and theft offenses. It will include corporate and business clients who entrust financial and tax concerns to their lawyers. Often in the civil arena, counsel is consulted because the client does not know if a practice has or will cross the line of legality. If consulting counsel will result in discovery and prosecution, few will seek legal advice.

III.

THE RIGHT TO DUE PROCESS AND ACCESS TO THE COURTS IS INFRINGED WHEN ATTORNEY-CLIENT COMMUNICATIONS ARE NOT PROTECTED BY THE ATTORNEY-CLIENT PRIVILEGE.

The Fourteenth Amendment to the United States Constitution guarantees that every person has the right to due process in the courts. It is axiomatic that a fundamental aspect of access to the courts is through legal counsel. The attorney-client relationship at risk in this matter was one formed in the context of a federal prosecution between a federal public defender and her client. The consultations between them took place in the context of that relationship and in light of the Fifth Amendment guarantee that the accused would not be required to incriminate herself. However, concerns about posthumous disclosure will not be limited to criminal clients.

> Knowing that communications will remain confidential even after death encourages the client to communicate fully and frankly with counsel. While fear of disclosure, and the consequent withholding of information from counsel, may be reduced if disclosure is limited to posthumous disclosure in a criminal context, it seems unreasonable to assume that it vanishes altogether. Clients may be concerned about reputation, civil liability, or possible harm to friends or family. Posthumous disclosure of such communications may be as feared as disclosure during the client's lifetime.

Swidler v. United States, 524 U.S. 399, 407 (1998). Information can be a powerful weapon. Some secrets can

have implications for generations to come. More than one crime has been committed in order to protect personal and private information.

The Ohio Supreme Court's ruling chills every person's access to legal advice and thus to redress in the courts by effectively eliminating the attorney-client privilege. No person who consults with counsel can be assured that any conversation will remain confidential.

The right to freely consult with one's attorney has implications far beyond the parameters of a criminal prosecution. The attorney-client privilege and other evidentiary privileges, "are a right to be let alone, a right to unfettered freedom, in certain narrowly described relationships, from the state's coercive or supervisory powers and from the nuisance of its eavesdropping." David W. Louisell, **CONFIDENTIALITY, CONFORMITY AND CONFUSION: PRIVILEGES IN FEDERAL COURT TODAY**, 31 Tul. L. Rev. 101, 109-110 (1956). The Ohio Supreme Court's ruling is not limited to criminal matters nor is the attorney-client privilege. The Lord Chief Baron said, in ***Annesley v. Earl of Anglesea,***

> [T]he foundation upon which it hath been held, and is certainly undoubted law, that attornies ought to keep inviolably the secrets of their clients, viz. That an increase of legal business, and the inability of parties to transact that business themselves, made it necessary for them to employ (and as the law properly expresses it, *ponere in loco suo*) other persons who might transact that business for them. That this necessity introduced with it the necessity of what the law hath very justly established, an inviolable secrecy to be observed by attornies, in order to render it safe for clients to communicate to their attornies all proper instruction for carrying on

> those causes which they found themselves under a necessity of intrusting to their care.

17 How. St. Tr. at 1241. Due process and access to the courts must include a right to privacy within the context of the attorney-client relationship. Eliminating or eroding the confidential attorney-client relationship undermines the fundamental principal of government that requires people to resolve matters through the legal system rather than through self-help. A government of laws cannot deny recourse to its legal system by invading the attorney-client relationship.

CONCLUSION

For all of the above reasons, Petitioner requests that this Court reverse the judgment of the Ohio Supreme Court and order that court to vacate the finding of contempt and dismiss all proceedings against her in this matter.

Respectfully submitted,

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APPENDIX

State v. Doe

2002-1666

SUPREME COURT OF OHIO

102 Ohio St.3d 1450; 2004 Ohio 2383; 808 N.E.2d 400; 2004 Ohio LEXIS 1063

May 13, 2004, Decided

NOTICE: DECISION WITHOUT PUBLISHED OPINION

PRIOR HISTORY: Montgomery App. No. 19408, 2002 Ohio 4966. Reported at 101 Ohio St.3d 170, 2004 Ohio 705, 803 N.E.2d 777, 2004 Ohio LEXIS 322 (2004)

OPINION:

RECONSIDERATION OF PRIOR DECISIONS

On motion for reconsideration.

Motion denied.

THE STATE OF OHIO, APPELLEE, v. DOE; LEWIS, APPELLANT.

[Cite as State v. Doe, 101 Ohio St.3d 170, 2003-Ohio-705.]

(No. 2002-1666-Submitted October 22, 2003, at the Clinton County Session-Decided March 3, 2004.)

APPEAL from the Court of Appeals for Montgomery County, No. 19408, 2002-Ohio-4906.

SYLLABUS OF THE COURT

1. In the event of the death of a client, R.C. 2317.02(A) authorizes the surviving spouse of that client to waive the attorney-client privilege protecting communications between the deceased spouse and attorneys who had represented that deceased spouse.

2. The attorney of a deceased client may not assert attorney-client privilege to justify refusal to answer questions of a grand jury where the surviving spouse of the attorney's client has waived the privilege in conformity with R.C. 2317.02(A), and the attorney has been ordered to testify by a court.

MOYER, C.J.

{¶ 1} This appeal concerns contempt proceedings brought against attorney Beth Goldstein Lewis, appellant. Lewis, citing attorney-client privilege and the advice of counsel, refused to answer written interrogatories propounded to her by a Montgomery County grand jury, even after having been ordered to do so by the Common Pleas Court of Montgomery County.

{¶ 2} Lewis had represented Jan Marie Franks in prior criminal matters. Franks died on December 30, 2001. In order to encourage Lewis to provide information concerning Franks in connection with a criminal investigation, the police obtained an affidavit from Franks's

surviving husband, Shane Nolan Franks. In that affidavit, Shane expressly consented, pursuant to R.C. 2317.02(A), to the disclosure of all communications made to Lewis by Jan Franks as client and to disclosure of any advice given to Franks by Lewis.

{¶ 3} The state thereafter issued a subpoena requiring Lewis to appear before the grand jury. Lewis appeared but refused to answer 18 of 20 written interrogatories submitted to her. Pursuant to R.C. 2317.02(A), the state then moved that the court of common pleas acknowledge the validity of the waiver executed by Shane Nolan Franks as the surviving spouse of Jan Marie Franks, "so that attorneys for her may be relieved of the limitations upon testimony as to communications that would have been privileged pursuant to R.C. 2317.02(A) or otherwise."

{¶ 4} Following an ex parte hearing on the state's motion, the court found that Shane Nolan Franks was the surviving spouse of Jan Franks at the time of her death. It concluded that his waiver of her attorney-client privilege was valid pursuant to R.C. 2317.02(A) and declared that attorneys who had represented her could testify regarding communications made between Jan Franks and her attorneys. Lewis nevertheless refused to answer the grand jury interrogatories.

{¶ 5} In a separate entry filed the same day, the court ordered Lewis to answer the written grand jury interrogatories. Lewis, aware of the entry of the court, again appeared before the grand jury and again refused to answer its questions.

{¶ 6} The following day the court held a hearing, pursuant to R.C. 2939.15.(fn1) Counsel for both the state and Lewis attended the hearing, which was closed to the public. Lewis was given an opportunity to present any evidence she might have challenging the court's factual

conclusion that Shane Franks was the surviving spouse of Jan Franks at the time of her death, but proffered none. After hearing the arguments of counsel, the court found Lewis in contempt of court. It ordered her confined to the county jail unless she purged herself of the contempt by answering the questions of the grand jury by noon of the following day. Lewis appealed from that order, and the same day the Court of Appeals for Montgomery County, with the agreement of the state, stayed the judgment of the trial court finding Lewis in contempt, pending disposition of the appeal.

{¶ 7} The court of appeals affirmed the holding of the trial court finding Lewis in contempt. It determined that R.C. 2317.02(A) authorized a court to compel an attorney to testify once the attorney-client privilege had been waived. The court of appeals further held that R.C. 2317.02(A) gave the same legal status to waiver of the attorney-client privilege by the surviving spouse as waiver of the attorney-client privilege by the client. Accordingly, the waiver of the attorney-client privilege by Shane Nolan Franks, coupled with the grand jury subpoena issued to Lewis, required her to testify regarding attorney-client communications made during her previous representation of Franks by Lewis.

{¶ 8} The cause is before this court upon the allowance of a discretionary appeal. We affirm the judgment of the court of appeals.

{¶ 9} Resolution of this appeal depends on interpretation of R.C. 2317.02. It provides:

{¶ 10} "The following persons shall not testify in certain respects:

{¶ 11} "(A) An attorney, concerning a communication made to the attorney by a client in that relation or the attorney's advice to a client, except that the attorney may testify by express consent of the client or, if the client is

deceased, by the express consent of the surviving spouse or the executor or administrator of the estate of the deceased client * * *." (Emphasis added.)

{¶ 12} Lewis correctly asserts that R.C. 2317.02(A) provides that an attorney may testify where a surviving spouse consents to it. She contends that use of the permissive word "may" indicates that an attorney may choose to testify or may refuse to testify, in the attorney's discretion, after a surviving spouse waives the attorney-client privilege.

{¶ 13} The state counters that R.C. 2317.02(A) does not give an attorney the discretion to disregard a valid waiver of attorney-client privilege made by the surviving spouse of a deceased client. It argues that the word "may" is used in the statute, as opposed to the word "shall," because the attorney of a deceased client may never be called to testify, or her testimony may not be relevant, or it may be inadmissible for other reasons. The state adamantly denies that the use of the word "may" in the statute vests an attorney with the final authority to determine whether attorney-client communications will be disclosed where a client has died.

{¶ 14} We are persuaded by the state's arguments and conclude that the court of appeals correctly interpreted R.C. 2317.02(A). It is axiomatic that the admissibility of evidence in a judicial proceeding is determined by a trial court in the sound exercise of its discretion. See, e.g., State ex rel. Van Dyke v. Public Emp. Retirement Bd., 99 Ohio St.3d 430, 2003-Ohio-4123, 793 N.E.2d 438, ¶ 43. R.C. 2317.02(A) provides that an attorney may testify by the express consent of the surviving spouse as opposed to mandating that an attorney shall testify by the express consent of the surviving spouse, in deference to the trial

court's well established role as the arbiter of the admission of evidence.

{¶ 15} The attorney-client privilege belongs solely to the client-not the attorney. Lightbody v. Rust (2000), 137 Ohio App.3d 658, 739 N.E.2d 840. In the event of the death of a client, R.C. 2317.02(A) entitles the surviving spouse of that client to waive the privilege on behalf of the deceased client. Ultimately, however, determination of whether an attorney must testify in judicial proceedings as to confidences received during representation of a deceased client lies with the court-not the attorney.

{¶ 16} Lewis contends that she knows better than Shane Franks whether Jan Franks would have wanted Lewis to disclose a communication Jan Franks made to her. Whether this is true is irrelevant. The General Assembly made that policy decision. R.C. 2317.02(A) vests authority to waive the attorney-client privilege in a surviving spouse, and not in an attorney. Shane Franks was the surviving spouse of Jan Franks and waived her privilege. Lewis had no legal justification to refuse to answer the questions of the grand jury in derogation of the order of the trial court to do so.

{¶ 17} Nor do we accept the argument that Lewis is ethically barred from answering the grand jury's interrogatories. While an attorney should preserve the confidences and secrets of his client, that obligation "does not preclude a lawyer from revealing information when his client consents after full disclosure, when necessary to perform his professional employment, when permitted by a Disciplinary Rule, or when required by law." (Emphasis added.) EC 4-2.

{¶ 18} Accordingly, DR 4-101 provides:

{¶ 19} "(C) A lawyer may reveal:

{¶ 20} "* * *

{¶ 21} "(2) Confidences or secrets when permitted under Disciplinary Rules or required by law or court order." (Emphasis added.)

{¶ 22} We hold that in the event of the death of a client, R.C. 2317.02(A) authorizes the surviving spouse of that client to waive the attorney-client privilege protecting communications between the deceased spouse and attorneys who had represented that deceased spouse. Moreover, we hold that the attorney of a deceased client may not assert attorney-client privilege to justify refusal to answer questions of a grand jury where the surviving spouse of the attorney's client has waived the privilege in conformity with R.C. 2317.02(A) and the attorney has been ordered to testify by a court.

{¶ 23} The trial court did not err in finding Lewis in contempt. The judgment of the court of appeals is therefore affirmed.

Judgment affirmed.

RESNICK, F.E. SWEENEY, PFEIFER, LUNDBERG STRATTON, O'CONNOR and O'DONNELL, JJ., concur.

F.E. SWEENEY, PFEIFER, LUNDBERG STRATTON, O'CONNOR and O'DONNELL, JJ., concur separately.

LUNDBERG STRATTON, J., concurring.

{¶ 24} I agree with the majority opinion. I write only to clarify my stance on the status of the contempt order against Lewis. The majority concludes by stating, "The trial court did not err in finding Lewis in contempt. The judgment of the court of appeals is therefore affirmed." While I agree that our judgment technically affirms that Lewis was in contempt of the trial court's order compelling her to testify, the assertion of attorney-client privilege under these unique circumstances was an issue of first

impression in this state. Consequently, unless Lewis continues to refuse to testify despite our ruling, I believe that no sanctions should be imposed on her. Therefore, I concur.

F.E. SWEENEY, PFEIFER, O'CONNOR and O'DONNELL, JJ., concur in the foregoing concurring opinion.

Mathias H. Heck Jr., Montgomery County Prosecuting Attorney, and Carley J. Ingram, Assistant Prosecuting Attorney, for appellee.

Sirkin, Pinales, Mezibov & Schwartz, L.L.P., Martin S. Pinales, John P. Feldmeier and Jarrod M. Mohler; Bieser, Greer & Landis, L.L.P., and David C. Greer; and Steve Keller, Federal Public Defender, for appellant.

Richard A. Magnus, urging reversal for amici curiae National Association of Criminal Defense Lawyers, Ohio Association of Criminal Defense Lawyers, Maumee Valley Criminal Defense Lawyers Association, and Greater Cincinnati Criminal Defense Lawyers Association.

Jim Petro, Attorney General, Douglas R. Cole, State Solicitor, Stephen P. Carney, Senior Deputy Solicitor, Diane Richards Brey, Deputy Solicitor, and Elizabeth Luper Schuster, Assistant Solicitor, urging affirmance for amicus curiae Attorney General of Ohio.

Footnotes:

1. R.C. 2939.15 provides: "If the court of common pleas determines that a witness before a grand jury is required to answer an interrogatory and such witness persists in his refusal, he shall be brought before the court, which shall proceed in a like manner as if such witness had been interrogated and refused to answer in open court."

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO,
Plaintiff-Appellee C.A. CASE NO. 19408

v. T.C. NO. 02 CR 1975
(Criminal Appeal from
JOHN DOE, Common Pleas Court)
Defendant-Appellant

OPINION

Rendered on the 19th day of September 2002.

.....

CARLEY J. INGRAM, Assistant Prosecuting Attorney, Dayton, Ohio, Attorney for Plaintiff-Appellee.

MARTIN S. PINALES, and JOHN FELDMEIER, and JARROD M. MOHLER, Cincinnati, Ohio, Attorneys for Defendant-Appellant.

DAVID GREER, Dayton, Ohio, Attorney for Defendant-Appellant.

STEVE KELLER, Federal Public Defender, Columbus, Ohio, Attorney for Defendant-Appellant.

RAVERT J. CLARK, Cincinnati, Ohio, Attorney for Amicus Curie Ohio Association of Criminal Defense Lawyers.

WOLFF, P. J.

Beth Lewis appeals from a judgment of the Montgomery County Court of Common Pleas, which found her in contempt of court for refusing to answer certain questions before a grand jury. Lewis, who is an attorney, refused to testify on the ground that the information sought was protected by the attorney-client privilege.

The background of the case is as follows. In 1999, nine-year-old Erica Baker disappeared in Kettering. At some point during their investigation, the police apparently received information that Jan Marie Franks may have been inside a van that struck and killed Erica and that the people in the van then took the body and disposed of it. No trace of Erica has ever been found. The police sought to question Franks about the information they had received, but she was uncooperative. Lewis, a Federal Public Defender, had represented Franks on unrelated federal offenses. The police apparently suspect that Franks may have confided information about Erica's disappearance to Lewis in the course of their attorney-client relationship. The precise basis for the state's belief that Franks was involved in Erica's disappearance or that Franks had confided in Lewis about involvement in that crime is unclear because we do not have the grand jury testimony of the state's other witnesses.

Franks died on December 30, 2001. The state subsequently sought to obtain testimony from Lewis before a grand jury about Franks' involvement in Baker's disappearance. A subpoena was issued and, at the state's request, the trial court found that the consent of Franks' surviving spouse to Lewis's testimony constituted a valid waiver of the attorney-client privilege. When Lewis was called before the grand jury, however, she still refused to testify on the ground that doing so would violate the

attorney-client privilege. After the trial court repeatedly ordered Lewis to testify, it found her in contempt and ordered her to be held in the Montgomery County Jail. Lewis filed a notice of appeal, and we granted a stay of execution of the trial court's judgment pending appeal. Lewis raises one assignment of error.

"THE TRIAL COURT ERRED, AS A MATTER OF LAW, WHEN IT ORDERED ATTORNEY LEWIS TO DISCLOSE CONFIDENTIAL ATTORNEY-CLIENT COMMUNICATIONS AND WHEN IT HELD HER IN CONTEMPT OF COURT FOR PROTECTING THOSE COMMUNICATIONS."

The statutory provision at issue in the dispute about whether Lewis must testify is R.C. 2317.02(A), which provides:

The following persons shall not testify in certain respects:

"(A) An attorney, concerning a communication made to the attorney by a client in that relation or the attorney's advice to a client, except that the attorney may testify by express consent of the client or, if the client is deceased, by the express consent of the surviving spouse or the executor or administrator of the estate of the deceased client and except that, if the client voluntarily testifies or is deemed by section 2151.421 of the Revised Code to have waived any testimonial privilege under this division, the attorney may be compelled to testify on the same subject[.]"

In this case, it is the consent of Franks' surviving spouse that is at issue and, in the interest of simplicity, we will refer in our discussion only to the surviving spouse, rather than to "the surviving spouse or the executor or administrator of the estate of the deceased client." Lewis argues that the language "may testify *** by the express

consent of the surviving spouse" means that where the surviving spouse consents, the decision whether to testify is within the attorney's discretion. She contends that this language does not authorize a court to compel the attorney to testify. She also contends that the language at the end of R.C. 2317.02(A) sets forth the specific circumstances in which the attorney "may be compelled to testify." This latter language lends support to her position that the former language does *not* authorize compelling the attorney to testify. The state, on the other hand, argues that the language of R.C. 2317.02(A) lifts the prohibition that an attorney shall not testify about communications with a client, and the state concludes that an attorney must testify when the surviving spouse consents and a grand jury subpoena has been issued. Despite reaching such divergent conclusions about the meaning of the statute, neither party believes that the statute is ambiguous.

After studying the statute closely, we conclude that the provision which states that the attorney may testify with the consent of the surviving spouse must be interpreted to mean that the attorney's testimony may be compelled under those circumstances. The statute provides that the attorney "may testify by express consent of the client or, if the client is deceased, by the express consent of the surviving spouse *** of the deceased client[.]" This statute vests the attorney with no more discretion when the surviving spouse consents to the testimony than when the client himself or herself consents to the testimony. We can envision no situation, however, in which an attorney would have discretion not to testify if the client validly consented to such testimony. It is well settled that the privilege belongs to the client, not to the attorney. See Annotation (1959), 67 A.L.R.2d 1268, 1269. Therefore, where the client has consented, we believe that an attorney would have no

choice but to testify about otherwise privileged communications if called upon to do so. There may be compelling policy reasons to differentiate between consent given by a client and consent given by a client's surviving spouse or representative. However, the language of the statute puts the consent of the client and the consent of the client's surviving spouse on equal footing and simply does not allow us to draw such a distinction.

The Supreme Court has held that "a lawyer's duty 'not to use or disclose confidential client information *** is superseded when the law specifically requires such use or disclosure.'" (Citations omitted.) *In re Original Grand Jury Investigation*, 89 Ohio St.3d 544, 547, 733 N.E.2d 1135, 2000 Ohio 170. In so holding, the court stated that language written in permissive terms can sometimes be interpreted to require disclosure. In *Original Grand Jury Investigation*, the court interpreted the language of Disciplinary Rule 4-101(C)(2), which provides that an attorney *may* reveal confidences or secrets when permitted under the Disciplinary Rules or required by law or court order, to require such disclosure by creating a "forced" exception to confidentiality in certain circumstances. We interpret the "discretionary" language of R.C. 2317.02(A) in the same manner.

Lewis also argues that the legislature's use of the language "the attorney may be compelled to testify" in the latter portion of R.C. 2317.02(A) shows that the legislature would have stated that testimony could be compelled with the consent of the surviving spouse if that were truly what it had intended in the earlier part of the statute. In other words, Lewis claims that the legislature would have used the words "may be compelled" throughout the statute if that were the intended effect. While the statute may be susceptible to this interpretation, we think the better interpretation is that the second exception set forth under

R.C. 2317.02(A) refers to an entirely different type of situation than the first exception. The second exception appears to embody a situation in which the client attempts to exert the privilege but the privilege is deemed to have been waived either by the client's own conduct (his own testimony on the matter) or by R.C. 2151.421(A), which requires attorneys to report suspected abuse or neglect. On the other hand, the first exception appears to presume that the attorney's testimony-and thus the waiver of the privilege-would be in keeping with the client's wishes, whether the consent is given by the client himself or by his surviving spouse or representative. In the typical situation under this exception- i.e., the testamentary exception, which will be discussed further infra-a person who is antagonistic to the attorney's client will not be seeking to compel the attorney's testimony, and it would therefore be unnecessary to couch the exception in the "may be compelled to testify" language. The attorney's testimony is voluntary, not compelled, in the sense that his client or his deceased client's representative has consented to the testimony. We recognize that, in some circumstances, such as the situation presented here, the consent of the surviving spouse is not necessarily consistent with the client's wishes, but the legislature did not provide for a different procedure in such a situation.

Lewis also characterizes R.C. 2317.02(A) as a testamentary exception to the attorney-client privilege. Such testamentary exceptions have been adopted by many states in order to effectuate a client's wishes when a dispute arises among potential heirs. Such exceptions are based on the presumption that the client would have wanted to waive his privilege in order to make his testamentary intentions known. Lewis argues that, because this case does not present a dispute among potential heirs to which her

testimony would be addressed, the surviving spouse should not be permitted to waive the privilege in this instance.

According to The New Wigmore: Evidentiary Privileges § 6.13.2 (2002), California Evidence Code § 957 codifies a typical contemporary version of the testamentary exception. It states: "There is no privilege under this article as to a communication relevant to an issue between parties all of whom claim through a deceased person, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction." See, also, Hawaii Rule of Evidence 503(c)(3). If, indeed, the Ohio legislature intended only to create a testamentary exception to the attorney-client privilege by adding to R.C. 2317.02(A) the provision that a surviving spouse or representative of the estate may consent to the attorney's testimony, its effort was so inartful as to prevent us from giving the provision that interpretation. The plain language of the statute in no way limits the consent to disputes among heirs. Moreover, the structure of the statute gives equal effect to the client's own consent and to the consent of the surviving spouse or representative, which makes it impossible for us to construe the statute so narrowly as to apply only in testamentary disputes. "We are not free to add words to a statute on the basis that the addition strikes us as desirable, or because we believe the legislature 'meant' to include it." *LaCourse v. Fleitz* (1986), 28 Ohio St.3d 209, 212, citing *Wheeling Steel Corp. v. Porterfield* (1970), 24 Ohio St.2d 24, 28, 53 Ohio Op. 2d 13, 263 N.E.2d 249. Thus, we cannot countenance Lewis's interpretation of this provision as only a testamentary exception to the attorney-client privilege.

Lewis also contends that the trial court's decision, i.e., forcing her to testify, is contrary to public policy and to the common law attorney-client privilege. We note, however, that "public policy is best left to the legislative branch, where it was entrusted by our Constitution

makers." *State v. Babcock* (1982), 7 Ohio App.3d 104, 106-107, 7 Ohio B. 136, 454 N.E.2d 556. "[W]hen the Legislature has spoken, within the powers conferred by the Constitution, its duly enacted statutes form the public policy and prescribe the rights of the people, and such statutes must be enforced, and not nullified by the judicial and executive departments of this state. In this regard the Legislature is supreme ***." *Tamarkin v. Children of Israel, Inc.*, (1965), 2 Ohio App.2d 60, 65, 31 Ohio Op. 2d 103, 206 N.E.2d 412, citing *Probasco v. Raine* (1893), 50 Ohio St. 378, 391, 34 N.E. 536. See, also, *State v. Smorgala* (1990), 50 Ohio St.3d 222, 223-224, 553 N.E.2d 672. While the attorney-client privilege is rooted in the common law, its particulars are a matter of state law, articulated by the Ohio General Assembly in R.C. 2317.02(A). Although we may question the wisdom of allowing a surviving spouse or representative to waive the attorney-client privilege in non-testamentary matters, we are not in a position to substitute our judgment for that of the legislature, and we must presume that the statute, as written, embodies the legislature's public policy determinations.

The question presented in this case is analogous to the question presented in *State v. Smorgala*, supra. In that case, the Supreme Court considered whether the courts should create a public policy limitation upon the statutorily created physician-patient privilege in a case involving drunk driving. The state wanted to obtain information about the driver's blood alcohol level, but it had not requested a blood alcohol test as authorized by R.C. 4511.191(A). *Id.* at 222. The doctor had obtained the information on his own initiative as part of the patient's treatment. *Id.* The state urged that the public interest in the effective prosecution of drunk driving cases outweighed any considerations which supported the uninhibited flow of information between

doctor and patient. Id. at 223. The court held that judicial policy preferences may not be used to override valid legislative enactments, for the General Assembly should be the final arbiter of public policy. Id. at 224. Although the argument in *Smorgala* was that the courts should find an exception to the physician-patient privilege, and the argument here is that we should not enforce a legislatively expressed exception to the attorney-client privilege, the rationale for leaving these matters in the hands of the legislature is the same.

Finally, Lewis emphasizes the fact that, in this case, there is compelling evidence that the surviving spouse did not effectuate the client's wishes in giving consent to the attorney's testimony. It is undisputed that during Franks' life, she had been unwilling to cooperate with the police or with the Baker family in providing information about Erica's fate or whereabouts, and there is nothing to suggest that Franks would have felt any differently about her attorney assisting in the investigation after her death. The legislature, however, in the statute that it drafted, did not provide for any weighing of the client's wishes. It could have done so, and if it had anticipated a situation in which a surviving spouse's consent would have clearly obviated the client's wishes, perhaps it would have drafted the statute differently. We note, however, that there are many competing interests at play in the protection of the attorney-client privilege. The attorney-client privilege promotes trust in the representational relationship, thereby facilitating the provision of legal services and ultimately the administration of justice. However, "an invocation of the attorney-client privilege should not go unexamined 'when it is shown that the interests of the administration of justice can only be frustrated by [its] exercise.'" *Swidler & Berlin v. United States* (1998), 524 U.S. 399, 118 S. Ct. 2081, 2088, 141 L. Ed. 2d 379 (O'Connor, J., dissenting).

Especially in the criminal context, the legislature might have reasonably concluded that, where a compelling law enforcement interest is at stake, the harm of precluding critical evidence that is unavailable by any other means outweighs the potential disincentive to forthright communication between attorney and client. Id. at 2090 (O'Connor, J., dissenting). We cannot speculate about the full range of circumstances in which the legislature intended for R.C. 2317.02(A) to apply. Nor can we conclude that compelling Lewis to testify in this criminal proceeding is so lacking in reason as to be beyond the legislature's contemplation, notwithstanding the fact that Franks might not have acquiesced in such testimony.

The assignment of error is overruled.

The judgment of the trial court is affirmed.

BROGAN, J. and FAIN, J., concur.

IN THE COMMON PLEAS COURT OF
MONTGOMERY COUNTY, OHIO

STATE OF OHIO — CASE NO. 2002 CR 01975

Plaintiff(s) — JUDGE MICHAEL T. HALL

v.

DECISION, ENTRY AND ORDER

JOHN DOE — **FILED UNDER SEAL**

Defendant(s)

This matter is before the Court pursuant to the Court's supervisory power over the Montgomery County Grand Jury as assigned under Local Rule 1.19 (III) (B) (1). Grand Jury Proceedings are secret and the Court has proceeded in that manner.

The Montgomery County Grand Jury is involved in an investigation in the above captioned case. By Motion filed June 25, 2002, the State of Ohio requested that the Court accept the surviving spouse's waiver of the attorney-client privilege of one Jan Marie Franks, aka Jan Marie Parson's, aka Jan M. Franks, aka Jan Franks, who is now deceased. A hearing was conducted on matter and, byentry filed June 25, 2003, at 1:40pm, this Court found that Shane Nolan Franks was the surviving spouse of Jan Marie Franks, etc., and further found that Shane Nolan Franks waived the attorney-client privilege of the decedent respect to representation by counsel in United States v. Jan Marie Parsons, Case No. CR-3-98-116, and with respect to

representation in State of Ohio v. Jan M. Franks, in Montgomery Co. Case No. 2000-CR-1139.

The Court further found that a witness before the Grand Jury, Beth Lewis, an attorney admitted to the practice of law in the State of Ohio, was called before the Grand Jury to testify. Two(2) sets of 10 written questions were submitted to the witness and she refused to answer those questions, claiming upon the advice of counsel, that answering those questions would be a violation of attorney-client privilege. Pursuant to Ohio Revised Code § 2939.14, the Court was informed of the Interrogatories and the refusal in writing. The Court examined the Interrogatories and the excuses. By entry of June 25, 2002, filed at 3:00p.m., the Court determined that the witness, Beth Lewis, was required to answer each of the 10 Interrogatories in each of the two (2) sets of questions, and the Grand Jury was so informed.

Thereafter, the witness again appeared before the Grand Jury, and refused to answer the same Interrogatories.

Pursuant to Ohio Revised Code §2939.14, an In-Chambers Conference was thereafter conducted on June 25, 2002, where arguments were received concerning the status of the issues. The Court indicated at that time that various parties would re-convene for further proceedings on record on June 26, 2002, at 1:00p.m.

As a result of that hearing, pursuant to Ohio Revised Code §2939.15, the Court determines that the witness, Beth Lewis, was required to answer the Interrogatories previously stated, that she had refused, and that she was brought before this Court.

After listening to the evidence and arguments of counsel, the Court confirms that the attorney-client privilege in this matter has been waived and that there has been a refusal to answer the questions before the Grand

Jury. The Court may proceed "as if such witness had been interrogated and refused to answer in open court." ORC §2929.15. The Court finds the witness in Contempt of Court. The witness is given the opportunity to purge the Contempt by answering the questions before the Grand Jury before 12:00 noon on June 27, 2002. If not thereby purged, the witness shall report to the Montgomery County Jail to be confined until she purges herself of the Contempt or is otherwise released as provided by law.

This Decision is **ORDERED** to be filed under seal. The parties or counsel are not to disclose the contents of this Decision without further Court order.

SO ORDERED.

JUDGE MICHAEL T. HALL

No. 04-207

In The Supreme Court of the United States

BETH LEWIS,

Petitioner,

-v-

STATE OF OHIO,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Ohio

BRIEF IN OPPOSITION

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LIST OF PARTIES

The Petitioner is attorney Beth Lewis, now known as Beth Trimmer. She was called to testify at a grand jury investigation in Montgomery County, Ohio into the disappearance of a child and was held in contempt of court for refusing to obey the court's direct order to answer certain questions put to her at a grand jury proceeding.

The Respondent is the State of Ohio.

John Doe is the person believed to be responsible for the disappearance of the child. Petitioner is mistaken in asserting that John Doe has been indicted; he has not. His identity is unknown.

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JURISDICTION

Petitioner first raised federal questions she has presented to this Court when she asked the Supreme Court of Ohio to reconsider its decision on the merits against her. The Ohio Supreme Court summarily denied the motion. Respondent, the State of Ohio, suggests that her failure to ask any state court to consider the federal questions she has presented to this court deprives this Court of jurisdiction under 28 U.S.C. § 1257.

STATUTE INVOLVED

Ohio Rev. Code § 2317.02:

The following persons shall not testify in certain respects:

(A) An attorney, concerning a communication made to the attorney by a client in that relation or the attorney's advice to a client, except that the attorney may testify by express consent of the client or, if the client is deceased, by the express consent of the surviving spouse or the executor or administrator of the estate of the deceased client and except that, if the client voluntarily testifies or is deemed by § 2151.421 of the Revised Code to have waived any testimonial privilege under this division, the attorney may be compelled to testify on the same subject.

STATEMENT OF THE CASE

Erica Baker is a nine-year-old girl who disappeared on a walk with her dog in her grandmother's neighborhood in Kettering, Ohio, on February 7, 1999. It is believed by police and prosecutors that an area woman, Jan Franks,

had information about what happened to Erica Baker that day. Jan Franks died in Dayton, Ohio on December 30, 2001. Beth Lewis, whose name is now Beth Trimmer, is an attorney who was a federal public defender and once represented Jan Franks in a criminal case in federal district court in Dayton.

Jan Franks was married to Shane Franks when she died. Ohio's attorney-client privilege is codified in Ohio Rev. Code § 2317.02, and it provides that the privilege can be waived by the express or implied consent of the client or, if the client is deceased, by the express consent of the surviving spouse or the executor or administrator of the client's estate. On April 4, 2002, Shane Franks, Jan Franks' widower, signed an affidavit and a waiver of his wife's attorney-client privilege. Beth Lewis was then subpoenaed to testify before the grand jury investigating Erica Baker's disappearance. She appeared, was sworn in, but refused to answer any questions about the matter under investigation, citing: 1) the attorney-client privilege; and 2) the Code of Professional Responsibility.

Following the procedure set out in Ohio law, the judge supervising the grand jury reviewed the questions and Petitioner's reasons for refusing to answer them, and he ordered Ms. Lewis to answer. Ohio Rev. Code § 2939.14. She refused to do so. The judge set a hearing for the following day and invited her to submit evidence and argument as to why she should not be held in contempt of court for refusing to answer the questions of the grand jury. Ohio Rev. Code § 2939.15. At that hearing, Ms. Lewis produced no evidence but argued that under the Ohio privilege statute, she, the attorney, had the power to choose whether to honor the surviving spouse's waiver of the privilege and if she decided not to testify, the court

lacked any authority to compel her to do so or to hold her in contempt if she did not. The heart of her argument was what "shall" and "may" meant in the context of Ohio Rev. Code § 2705.02. (Petitioner made a fleeting reference to the constitution but none of her arguments was based on federal law.) At the end of the hearing, the trial judge found Ms. Lewis to be in contempt of court. He gave her the opportunity to avoid punishment by answering the grand jury's questions by noon the next day. She announced her decision not to obey the court's order and the court refused to stay execution of the jail sentence.

Petitioner immediately appealed and obtained a stay of the jail sentence from the Ohio Court of Appeals for the Second Judicial District. On appeal, she reiterated and expanded the policy and statutory construction arguments she had made in the trial court. (See Appendix A, Petitioner's Assignment of Error and Issues Presented for Review in the Ohio Court of Appeals). She never raised the questions she has presented to this Court. On September 19, 2002, the Court of Appeals affirmed the finding of contempt.

Petitioner then appealed to the Supreme Court of Ohio. Once again, she confined her arguments to Ohio law. (See Appendix B, Petitioner's Propositions of Law in the Supreme Court of Ohio). The Supreme Court of Ohio issued a decision on the merits affirming the lower courts on March 3, 2004.

After the Supreme Court of Ohio issued its decision, Petitioner asked for reconsideration, raising then for the first time the federal questions that she would now have this Court decide. The Supreme Court of Ohio refused to reconsider its opinion. Petitioner immediately filed a

notice of removal of the action to federal court, to which the State objected for three reasons: 1) that there is no case left to remove because all of the issues have been settled; 2) that the notice of removal is untimely, coming as it did after the conclusion of the case; and, 3) that petitioner is precluded from re-litigating in federal court the issues that were or could have been settled in state court. That action is pending. Petitioner also asked this Court to issue a writ of certiorari.

REASONS FOR DENYING THE WRIT

Petitioner has not offered this Court a compelling reason to grant the writ. Her Petition fails for at least three reasons.

A. First, no Ohio court reviewing this case has ever passed upon the questions that Petitioner has presented to this Court, in which she invokes the protections of the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution. The reason that no Ohio court has reached those questions is that Petitioner never raised them until after the Supreme Court of Ohio had decided the case on the merits, by which time they were considered waived. Rule XI of the Ohio Supreme Court Rules of Practice allows a litigant to ask the Supreme Court of Ohio to reconsider a decision on the merits before the decision becomes final, but it is an established, long-standing rule in Ohio that the Supreme Court of Ohio will not address a question, even a federal constitutional question, unless the question was presented and urged in the court below. *State v. Williams*, 51 Ohio St.2d 112, 117, 364 N.E.2d 1364, 1367 (1977); *State ex rel Yates v. Abbott*

Laboratories, 766 N.E.2d 956, 963, 95 Ohio St.3d 142, 148 (2002); *State v. Issa*, 752 N.E.2d 904, 920, 93 Ohio St.3d 49, 62 (2001); *State ex rel. Kay v. Cleveland*, 271 N.E.2d 784, 785-786, 27 Ohio St.2d 37, 38 (1971). Petitioner's attempt to present new, federal questions dressed as a motion for reconsideration to the Supreme Court of Ohio was doomed by her failure to raise those federal questions in the trial court, the court of appeals, or in the brief on the merits in the Supreme Court of Ohio.

From the beginning of this case until after the Supreme Court of Ohio issued its opinion, Petitioner has defended her refusal to answer the grand jury's questions by arguing that the waiver provision of Ohio's attorney-client privilege statute gave her, the attorney, the choice to testify or not. According to her, a valid waiver of the privilege is merely a condition precedent to a lawyer's choosing whether to testify when called to do so. Her argument has always been that the courts had misread the Ohio statute, an argument she supported by emphasizing certain policy considerations. She also argued, without any real basis, that the waiver applied only in testamentary matters. She did not argue that she, her client, or anyone else stood to suffer violations of their rights under the United States Constitution if she obeys the court's order to return to the grand jury and answer its questions. This is hardly the forum to debate those questions for the first time.

Whether Petitioner's failure to raise the claims below deprives this Court of all power to review them under the certiorari jurisdiction granted under 28 U.S.C. § 1257, or whether the "not pressed or passed upon below" rule is merely a prudential restriction that does not pose an insuperable bar to review, the writ should be denied.

Although Petitioner insists that the questions are of great import, she failed to raise them in a forum where they could have been debated and decided. Because the questions have not been raised or decided by any state court, the record is entirely lacking in evidence or argument that might support her claims. There is no reason for this Court to take this case to decide federal questions that Petitioner did not raise in any Ohio court. *Yee v. Escondido*, 503 U.S. 519, 533 (1992); *Banker's Life and Casualty Co. v. Crenshaw*, 486 U.S. 71, 77-78 (1988); *Illinois v. Gates*, 462 U.S. 213, 217-225 (1983).

B. The issues presented by Petitioner to this Court for review are entirely theoretical. No one's Fifth, Sixth, or Fourteenth Amendment rights have been violated in this case, nor will constitutional violations ensue if the Court does not do as Petitioner wishes. Petitioner's client is dead (as are all clients whose attorney-client privilege can be waived by a surviving spouse) and the client cannot claim the protections afforded by the Fifth, Sixth, or Fourteenth Amendments to the United States Constitution. Furthermore, if there could exist a set of facts under which a living person risked having his or her constitutional rights violated by imposition of Ohio's provision for post-mortem waiver of the attorney-client privilege, then that person would have standing to argue that Ohio's statute could not be enforced if doing so violated his rights. Cf. *Green v. Georgia*, 442 U.S. 95 (1979); *Chambers v. Mississippi*, 410 U.S. 284 (1973).

Because neither petitioner's constitutional rights, her client's constitutional rights, nor any other person's constitutional rights have been violated or are at risk of being violated by Ohio's attorney-client privilege post-mortem waiver provision, there is no actual case or controversy here and the writ should be denied for that reason. *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990).

C. The issues Petitioner presents involve an unusual feature of Ohio's attorney-client privilege. This provision, which allows the surviving spouse of a deceased client to waive the attorney-client privilege on the client's behalf, has rarely been used in Ohio, and never, as far as counsel can ascertain, in a criminal matter. Additionally, no other state's version of the attorney-client privilege appears to permit the surviving spouse of a deceased client to waive the privilege for any purpose as Ohio's does. The questions presented, even if properly before the Court, are not being debated in the states, and are unrelated to those cases in which there is no provision for post-mortem waiver of the privilege. Cf. *Swidler & Berlin v. United States*, 524 U.S. 399 (1998). Because the questions presented affect only one rarely-used statute in one state, it is not an issue that bears review by this court.

CONCLUSION

For these reasons, the writ should be denied.

Respectfully submitted,

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Respondent

APPENDIX A

PETITIONER'S ASSIGNMENT OF ERROR AND ISSUES PRESENTED FOR REVIEW IN THE OHIO COURT OF APPEALS

State of Ohio v. John Doe, Court of Appeals for Montgomery County, Case No. 19408.

THE TRIAL COURT ERRED, AS A MATTER OF LAW, WHEN IT ORDERED ATTORNEY LEWIS TO DISCLOSE CONFIDENTIAL ATTORNEY-CLIENT COMMUNICATIONS AND WHEN IT HELD HER IN CONTEMPT OF COURT FOR PROTECTING THESE COMMUNICATIONS. (*Decision*, T.d. 7).

ISSUES PRESENTED FOR REVIEW

Based on Appellant Grand Jury Witness' assignment of error, the following issues are presented for review on appeal and will be discussed more fully in this brief:

A. Under R.C. 2317.02(A), An Attorney May Not Be Found In Contempt Of Court For Refusing To Answer Questions She Believes To Be Privileged Attorney-Client Communications Absent A Prior Finding By The Court That The Client Has Voluntarily Testified Or Waived The Attorney-Client Privilege.

B. Even With The Consent Of A Client's Surviving Spouse Under R.C. 2317.02(A), An Attorney Is Not Required To Testify Regarding Confidential Communications With Her Client When Such Testimony Is Sought In Non-Probate Proceedings Or Is Contrary To Or Inconsistent With The Interest Or Intentions Of The Client.

C. Under R.C. 2317.02(A), When A Surviving Spouse Consents To The Disclosure Of Confidential Attorney-Client Communications Between His Now-Deceased Spouse And Her Attorney, The Attorney Is Permitted, But Is Not Required, To Testify.

D. Absent A Waiver From The Client, The Compelled Disclosure Of Confidential Attorney-Client Communications Violates The Public Policy Of The State.

E. A Court May Not Compel An Attorney To Testify Under R.C. 2317.02(A) Regarding Confidential Attorney-Client Communications Where The Attorney Is Given Insufficient Opportunity To Present Evidence As To Why Such Testimony Is Inconsistent With The Client's Interests And Intent.

APPENDIX B

PETITIONER'S PROPOSITIONS OF LAW IN THE SUPREME COURT OF OHIO

State of Ohio v. John Doe, Supreme Court of Ohio, Case No. 2002-1666

PROPOSITION OF LAW NO. I:

The judiciary is a separate and distinct branch of the government, and the administration of justice by the judiciary, including all matters relating to the practice of law, cannot be impeded by the legislature in the exercise of their respective powers.

PROPOSITION OF LAW NO. II:

Absent a waiver or consent from the client, the compelled disclosure of confidential attorney-client communications violates the public policy of Ohio.

PROPOSITION OF LAW NO. III:

Under R.C. 2317.02(A), an attorney may not be found in contempt of court for refusing to answer questions regarding privileged attorney-client communications absent a prior finding by the court that *the client* has voluntarily testified or waived the attorney-client privilege.

PROPOSITION OF LAW NO. IV:

Even with the consent of a client's surviving spouse under R.C. 2371.02(A), an attorney is not required to testify regarding confidential client communications when such testimony is sought in non-probate proceedings or is contrary to the client's interests or intentions.

PROPOSITION OF LAW NO. V:

Under R.C. 2317.02(A), when a surviving spouse consents to the disclosure of confidential attorney-client communications between his now-deceased spouse and her attorney, the attorney is permitted, but is not required, to testify.

PROPOSITION OF LAW NO. VI:

A court may not compel an attorney to testify under R.C. 2317.02(A) regarding confidential attorney-client communications where the attorney is given insufficient opportunity to present evidence as to why testimony is inconsistent with the client's interests and intent.

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(3)

Supreme Court, U.S.
FILED
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No. 04-207

IN THE
SUPREME COURT OF THE UNITED STATES

BETH LEWIS,

PETITIONER,

-v-

STATE OF OHIO,

RESPONDENT.

On Petition for Writ of Certiorari to the Supreme Court of Ohio

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REPLY TO BRIEF IN OPPOSITION TO WRIT OF CERTIORARI

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LIST OF PARTIES

Petitioner is attorney Beth Lewis.

Respondent is the State of Ohio.

In the proceedings below, John Doe, an unidentified person investigated by the Montgomery County Grand Jury, was also listed as a party.

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REASONS FOR GRANTING THE WRIT

Respondent argues that review should be denied for three reasons. They are addressed below in the order presented by Respondent.

A. THIS CASE IS PROPERLY BEFORE THE COURT

Respondent argues that presentation of the federal constitutional claims to the Ohio Supreme Court in a Motion for Reconsideration is inadequate to allow review by this Court. Rule XI of the Ohio Supreme Court Rules of Practice is designed to allow the court to re-evaluate decisions specifically because not all pertinent claims or arguments were made. The rule requires that new grounds for reviewing its decision be presented to the court. It prohibits re-argument of the case.

Respondent's view that use of this procedure was an inadequate vehicle by which to press her claims is in error. Rule XI of the Ohio Supreme Court Rules of Practice meets all of the requirements of federalism and comity. It allows the highest court in the state to review the issue; to send it back to the lower courts for further proceedings; to alter a previous decision; or to issue a new one.

The Ohio Supreme Court denied Petitioner's motion for reconsideration more than two months after it was filed. The matter was not dismissed. It was denied. A denial is a decision on the merits determining that the factors raised do not require the court to revise its earlier decision and thus is a final judgment by the highest court of the state within the meaning of 28 U.S.C. §1257. This matter is properly before this Court.

When a Motion for Reconsideration is filed pursuant to Ohio Supreme Court Rule of Practice XI, the Ohio Supreme Court's mandate does not issue. Its opinion does not become final until the motion for reconsideration

has been addressed. This is apparent from the rule itself but is explained in Justice Holmes' dissent in ***City of Rocky River v. State Employment Relations Board***, 41 Ohio St.3d 602 (1989). He noted (discussing an earlier version of the reconsideration rule), "A case has always been considered and declared final upon the denial of the motion for rehearing and issuance of our mandate." *Id.* at 607.

Although raising the federal constitutional issues in a motion for reconsideration before the Ohio Supreme Court is by itself sufficient to allow review, counsel for Attorney Lewis did alert the lower courts to the federal constitutional ramifications of interpreting Ohio's attorney-client privilege statute to allow posthumous third party waiver of the privilege. In the Montgomery County Court of Common Pleas, her lawyer said, "I guess I have already touched upon what I feel are the state and federal Constitutions, as to right of access to counsel, as to due process. That would be implicated by a different interpretation of the statute." ***State v. Doe***, Case No. 2002-CR-1975, Montgomery County Court of Common Pleas, Hearing Transcript June 25-26, 2002, p. 51. The court held, "You indicated that there was a constitutional issue. I don't think that the constitutional issue that you referred to in the Federal case is applicable to this situation." *Id.* at p.65.

In the Montgomery County Court of Appeals and her initial appeal to the Ohio Supreme Court, Attorney Lewis told the courts that violation of the privilege "will severely stifle and undermine the full and frank communications between attorney and client that are critical to the fair and effective representation of all clients." Montgomery County Court of Appeals Brief, p. 4; Ohio Sp. Ct. Brief, p. 16. Ohio interprets its guarantee of effective assistance of counsel to be the same standard as the Sixth Amendment. ***State v. Williams***, 99 Ohio St.3d 493, 508, 794 N.E.2d 27, 46 (2003), ***State v. Bradley***, 42

Ohio St. 3d 136, 142, 538 N.E.2d 373, 379 (1989). When Petitioner told the courts that posthumous third-party waiver would negatively impact the ability to provide effective assistance, she alerted them to the federal issue.

In addition, *amici curiae* in the Ohio Supreme Court cited the guarantees of the Fifth, Sixth and Fourteenth Amendments as grounds for denying infringement of the attorney client privilege by permitting third-party posthumous waiver. Merit Brief of *Amici Curiae* National Association of Criminal Defense Lawyers, Ohio Association of Criminal Defense Lawyers, Maumee Valley Criminal Defense Lawyers Association, and Greater Cincinnati Criminal Defense Lawyers Association, p. 4.

Throughout the state court proceedings, this case was viewed by all as one of statutory interpretation. The Ohio courts all sought to identify the legislative intent of the statute and that was the primary focus of briefing. Even so, all were informed that an interpretation that invaded the attorney-client privilege would run afoul of the federal constitution. When the Ohio Supreme Court held that the attorney-client privilege could be waived posthumously by third parties, outside the scope of the widely recognized testamentary exception, Attorney Lewis sought reconsideration focusing on the federal constitutional violations the new holding allowed.

The questions before this Court were properly presented below. The principles of comity and federalism have been protected. There is no bar to jurisdiction in this Court.

B. ONGOING CONTEMPT PROCEEDINGS MAKE THIS A LIVE CONTROVERSY

Respondent asserts that because Ms. Franks, Attorney Lewis's client, is dead there is no case or controversy. To the contrary, Attorney Lewis as Ms. Franks' counsel is

under a continuing legal obligation to protect privileged communications and faces imprisonment for contempt in this matter. Furthermore, the chilling effect of the Ohio Supreme Court's ruling on all future attorney-client relationships makes this a matter of great public interest and importance.

C. THE CONSEQUENCES OF THE OHIO SUPREME COURT DECISION ARE FAR REACHING

Respondent argues that because the statute at issue is enforced only in Ohio, its effect is not broad enough to warrant this Court's attention. In fact the ramifications of this statute are broad. It affects every person who may be involved in litigation in Ohio. The statute does not limit its reach to those who sought counsel in Ohio. Every attorney-client relationship is at risk, regardless of where formed, if counsel is called to testify in Ohio.

CONCLUSION

For all of the reasons stated above and in Attorney Lewis's Petition for a Writ of Certiorari, the writ should be granted.

Respectfully submitted,

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